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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TAVARIE EPPERSON, Defendant and Appellant.	F072174 (Super. Ct. No. 14CM1949) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Donna L. Tarter, Judge.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen, Darren K. Indermill and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Tavarie Epperson and two other men robbed victims D.R. and Rachel T. at gunpoint. One of the men shot D.R. in the leg during the incident and then fired again as D.R. fled. Defendant was arrested several weeks later and charged with the attempted murder of D.R. (Pen. Code, §§ 664/187) (count 1),[1] the robbery of Rachel (§ 211) (count 2), the attempted robbery of D.R. (§§ 664/211) (count 3) and burglary (§ 459) (count 4). The attempted murder was alleged to have been premeditated, willful and deliberate (§ 189), and sentence enhancement allegations for the personal use of a firearm were attached to counts 2 and 4 (§§ 12022.5, subd. (a), 12022.53, subd. (b)).

Defendant's first trial ended in a mistrial after the jury deadlocked on all counts. At the close of the People's case-in-chief in the second trial, the trial court granted the prosecutor's motion to amend count 3 from the attempted robbery of D.R. to the robbery of D.R. The jury subsequently convicted defendant on all counts, found true the premeditation allegation attached to count 1 and found true the firearm enhancements attached to counts 2 and 4.

The trial court imposed a total determinate term of 20 years plus an indeterminate term of seven years to life in prison, as follows. The court sentenced defendant to seven years to life for the attempted murder of D.R. (count 1). For the robbery of Rachel (count 2), the court sentenced defendant to a consecutive aggravated term of nine years, plus the aggravated term of 10 years for personal use of a firearm under section 12022.5, subdivision (a), stayed, and 10 years for personal use of a firearm under section 12022.53, subdivision (b). For the robbery of D.R. (count 3), the court sentenced defendant to a consecutive one-year term (one-third of the middle term). Finally, for the burglary (count 4), the court sentenced defendant to the aggravated term of six years, plus

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1 All further statutory references are to the Penal Code.

10 years for personal use of a firearm under section 12022.5, subdivision (a). The court stayed the burglary sentence under section 654.

Defendant appealed and raised claims relating to his conviction for the robbery of D.R. (count 3). Defendant claimed his right to due process was violated when, at the close of the People's case-in-chief, the trial court permitted the prosecutor to amend count 3 from attempted robbery to robbery, and he sought reversal of the conviction. Relatedly, and dependent upon our agreement that he was entitled to reversal of his conviction for the robbery of D.R., he also sought reversal of his conviction for the attempted murder of D.R. on the ground that the jury may have impermissibly relied on that robbery count in finding that the attempted murder of D.R. was a natural and probable consequence of robbery.[2] Finally, if his conviction for robbing D.R. was not reversed, he argued that the trial court erred in failing to stay the sentence on count 3 under section 654, which prohibits multiple punishments for both crimes completed by a single act and a criminal course of conduct committed pursuant to a single intent and objective. (*People v. Corpening* (2016) 2 Cal.5th 307, 311 (*Corpening*).).

The People did not concede any issues.

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2 With respect to the attempted murder count, the jury was instructed on the natural and probable consequences doctrine, under which "'"[a] person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime."'" (*People v. Favor* (2012) 54 Cal.4th 868, 874.) In this case, attempted murder was the nontarget offense and robbery was the target offense. Defendant agreed that if his attempted murder conviction under the natural and probable consequences doctrine was based on the robbery of Rachel, it is valid. He argued, though, that given his entitlement to reversal of his conviction for robbing D.R., the jury may have convicted him of attempted murder based on a legally invalid theory: that the attempted murder of D.R. was the natural and probable consequence of the robbery of D.R. Defendant asserted that when a jury has been presented with a *legally* invalid theory, "reversal generally is required unless 'it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory.'" (*People v. Perez* (2005) 35 Cal.4th 1219, 1233.) Which standard of review applies to such situations is currently pending before the California Supreme Court. (*People v. Aledamat* (2018) 20 Cal.App.5th 1149, review granted July 5, 2018, S248105.)

In our now-vacated opinion, we rejected defendant's claim that the amendment of count 3 at trial to charge him with robbing D.R. violated his right to due process, which mooted his challenge to his attempted murder conviction on the ground that the jury may have relied on a legally inadequate theory to convict him. (*People v. Epperson*, review granted Jan. 10, 2018, S245034.) We agreed that defendant's sentence for robbing D.R. should have been stayed under section 654, however, and we stayed the sentence for count 3. We otherwise affirmed the judgment.

The California Supreme Court granted review and has now returned the case to us with directions to vacate our opinion and reconsider the cause in light of Senate Bill No. 1437 (Stats. 2018, ch. 1015, § 4) (Senate Bill No. 1437 or Sen. Bill No. 1437) and Senate Bill No. 620 (Stats. 2017, ch. 682, §§ 1, 2) (Senate Bill No. 620 or Sen. Bill No. 620). (*People v. Epperson*, review granted Jan. 10, 2018, S245034.) Following supplemental briefing, we reject defendant's claim that he is entitled to relief under Senate Bill No. 1437 on direct appeal, but, in addition to staying the sentence on count 3 under section 654, we modify the opinion and remand the matter to allow the trial court to exercise its discretion in the first instance with respect to whether to strike the firearm enhancements in light of Senate Bill No. 620. Except as modified, the judgment is affirmed.

FACTUAL SUMMARY

On June 19, 2014, D.R. and Rachel were at a motel in Hanford where D.R. had rented a room. At approximately 10:30 p.m., D.R. stepped outside the room to smoke a cigarette. He noticed a black sport utility vehicle drive by with its lights off. Minutes later, as he stood there smoking, three men came up the stairs. The first man, who was armed with a pistol, approached and told D.R. to give him everything D.R. had. The man

then cocked the gun and fired, hitting D.R. in the leg. As D.R. turned and ran, the man fired again, hitting an exterior wall of the motel.[3]

Rachel, who was inside the motel room, heard three gunshots and then the three men came into the motel room. Defendant, who had a distinctive tattoo under his eye, pointed a shotgun in Rachel's face and asked, "[W]here is all the stuff at?" As she knelt on the floor pleading for her life, the other two men took some items that belonged to her and some items that belonged to D.R. All three men then fled.

DISCUSSION

I. Amendment of Count 3 from Attempted Robbery to Robbery

A. Background

As set forth *ante*, defendant was initially charged in count 3 with the attempted robbery of D.R. and his first jury trial ended in a mistrial. After the People concluded their case-in-chief in the second jury trial, the prosecutor moved to amend count 3 from attempted robbery to robbery, to conform to proof of evidence adduced at trial. Defendant's counsel did not object to the amendment and the trial court granted the motion. Defendant was subsequently convicted on all counts and he now claims that the amendment at that juncture in the proceedings violated his right to due process.

A prosecutor's right to amend the information is governed by statute. Section 1009 provides that "[a]n information may be amended 'for any defect or insufficiency, at any stage of the proceedings,' so long as the amended information does not 'charge an offense not shown by the evidence taken at the preliminary examination.' (§ 1009.)[4] 'If the substantial rights of the defendant would be prejudiced by the

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[3] D.R. testified the gunman fired once as he fled; Rachel testified she heard three gunshots. Law enforcement officers recovered two bullet casings from the ground and located two bullet holes in the exterior wall of the motel.

[4] Section 1009 provides in full: "An indictment, accusation or information may be amended by the district attorney, and an amended complaint may be filed by the prosecuting attorney, without leave of court at any time before the defendant pleads or a demurrer to the

amendment, a reasonable postponement not longer than the ends of justice require may be granted.' [Citation.] If there is no prejudice, an amendment may be granted 'up to and including the close of trial.'" (*People v. Goolsby* (2015) 62 Cal.4th 360, 367–368]; accord, *People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1580–1581 (*Arevalo-Iraheta*); *People v. Winters* (1990) 221 Cal.App.3d 997, 1005 (*Winters*).) "The court has broad discretion to deny leave to amend, and must do so if the amendment would prejudice the defendant's substantial rights." (*People v. Birks* (1998) 19 Cal.4th 108, 129.)

"'The questions of whether the prosecution should be permitted to amend the information and whether continuance in a given case should be granted are matters within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent a clear abuse of discretion.'"[5] (*People v. Hamernik, supra*, 1 Cal.App.5th at p. 424;

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original pleading is sustained. The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings, or if the defect in an indictment or information be one that cannot be remedied by amendment, may order the case submitted to the same or another grand jury, or a new information to be filed. The defendant shall be required to plead to such amendment or amended pleading forthwith, or, at the time fixed for pleading, if the defendant has not yet pleaded and the trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted. An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination. A complaint cannot be amended to charge an offense not attempted to be charged by the original complaint, except that separate counts may be added which might properly have been joined in the original complaint. The amended complaint must be verified but may be verified by some person other than the one who made oath to the original complaint." (Italics added.)

5 Defendant asserts that the de novo standard of review applies in this instance because "[t]his issue arguably raises a pure question of law." However, he neither cites to direct authority for that proposition nor addresses the long line of appellate court cases applying the abuse of discretion standard to claims of error under section 1009. (E.g., *People v. Hamernik* (2016) 1 Cal.App.5th 412, 424; *People v. Byrd* (1960) 187 Cal.App.2d 840, 842 ["Whether the prosecution will be permitted to amend an information is a matter within the sound discretion of the trial court and its determination will not be overturned on review in the absence of a clear abuse thereof."].) Defendant cites *People v. Cromer* (2001) 24 Cal.4th 889, but that case did not

accord, *Arevalo-Iraheta*, *supra*, 193 Cal.App.4th at pp. 1580–1581; *People v. Bolden* (1996) 44 Cal.App.4th 707, 716.)

B. Forfeiture

Correctly anticipating the People's argument that he forfeited this claim by failing to object at trial, defendant argues the failure to object does not forfeit a claim of jurisdictional error and "[a]s the jurisdictional error is based on the constitution, [he] is permitted to raise claims asserting the deprivation of certain fundamental, constitutional rights for the first time on appeal." We are unpersuaded.

Defendant's argument fails to distinguish between types of jurisdictional defects. There is a distinction between fundamental jurisdiction and acts in excess of jurisdiction granted by statute or other basis in the law, and this distinction matters for purposes of the forfeiture doctrine. The California Supreme Court has explained, "In its fundamental sense, 'jurisdiction' refers to a court's power over persons and subject matter. [Citation.] Less fundamentally, 'jurisdiction' refers to a court's authority to act with respect to persons and subject matter within its power. [Citation.] Issues relating to jurisdiction in its fundamental sense indeed may be raised at any time. [Citations.] By contrast, issues relating to jurisdiction in its less fundamental sense may be subject to bars including waiver (i.e., the intentional relinquishment of a known right) [citation] and forfeiture … [citation]." (*People v. Mower* (2002) 28 Cal.4th 457, 474, fn. 6; see *People v. Delgado*

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involve a challenge to a ruling under section 1009 and it appears it is cited for the general proposition that "[t]raditionally … an appellate court reviews findings of fact under a deferential standard (substantial evidence under California law, clearly erroneous under federal law), but it reviews determinations of law under a nondeferential standard, which is independent or de novo review." (*Cromer*, *supra*, at p. 894.) As the California Supreme Court has explained, "[t]he abuse of discretion standard … reflects the trial court's superior ability to consider and weigh the myriad factors that are relevant to the decision at hand." (*People v. Roldan* (2005) 35 Cal.4th 646, 688, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) To the extent defendant's assertion might arguably be construed as challenging the longstanding application of the abuse of discretion standard to section 1009 rulings, we find that argument waived as a result of defendant's failure to support it with legal argument and citation to authority. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1029.)

(2017) 2 Cal.5th 544, 558–559.) "When a trial court has fundamental jurisdiction but fails to act in the manner prescribed, it is said to have acted 'in excess of its jurisdiction.' [Citation.] Because an ordinary act in excess of jurisdiction does not negate a court's fundamental jurisdiction to hear the matter altogether [citation], such a ruling is treated as valid until set aside. [Citation.] A party may be precluded from seeking to set aside such a ruling because of waiver, estoppel, or the passage of time." (*People v. Ford* (2015) 61 Cal.4th 282, 287.) Thus, while "a lack of fundamental jurisdiction may be raised at any time, a challenge to a ruling in excess of jurisdiction is subject to forfeiture if not timely asserted." (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1422.)

The issue raised by defendant on appeal does not implicate fundamental jurisdiction. As we explain below, section 1009 itself protects a criminal defendant's right to due process and where a court has abused its discretion in permitting an amendment under that section, it has acted in excess of its statutory jurisdiction. Such a claim is subject to forfeiture in the absence of an objection. (*People v. Seaton* (2001) 26 Cal.4th 598, 641; *People v. Leonard* (2014) 228 Cal.App.4th 465, 481–484; *People v. Fernandez* (2013) 216 Cal.App.4th 540, 555; *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1056.)

Turning to forfeiture in this instance, the "doctrine is a 'well-established procedural principle that, with certain exceptions, an appellate court will not consider claims of error that could have been—but were not—raised in the trial court. [Citation.]' [Citations.] Strong policy reasons support this rule: 'It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided. [Citations.]'" (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.) We find defendant's failure to object to the amendment in the trial court forfeits the claim on appeal; his contrary arguments are unpersuasive. (*People v. Seaton*, *supra*, 26 Cal.4th at p. 641; *People v. Leonard*, *supra*, 228 Cal.App.4th at p. 481; *People v. Fernandez*, *supra*, 216 Cal.App.4th at p. 555; *People v. Carrasco*, *supra*, 137

Cal.App.4th at p. 1056; cf. *People v. Valladoli* (1996) 13 Cal.4th 590, 606 [facial constitutional challenge to statute permitting amendment to indictment or information arguably properly raised despite failure to object in trial court].) Forfeiture notwithstanding, we will nevertheless address the merits of defendant's claim given his derivative ineffective assistance of counsel claim. (*People v. McCullough* (2013) 56 Cal.4th 589, 593; *People v. Lua* (2017) 10 Cal.App.5th 1004, 1014; see *Harrington v. Richter* (2011) 562 U.S. 86, 105 ["An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial …."]; *People v. Jackson* (2016) 1 Cal.5th 269, 347; but see *People v. Riel* (2000) 22 Cal.4th 1153, 1202 ["[The defendant] cannot automatically obtain merit review of a noncognizable issue by talismanically asserting ineffective assistance of counsel."].)

C. Analysis

"The 'preeminent' due process principle is that one accused of a crime must be 'informed of the nature and cause of the accusation.' (U.S. Const., Amend. VI.) Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial. [Citation.] [¶] Thus, the right to defend has two related components, namely, the right to *notice* of the charges, and the right to *present a defense* to those charges." (*People v. Jones* (1990) 51 Cal.3d 294, 317; see *People v. Seaton, supra,* 26 Cal.4th at pp. 640–641; *People v. Peyton* (2009) 176 Cal.App.4th 642, 657.)

"'Section 1009 specifically proscribes amending an information to charge an offense not shown by the evidence taken at a preliminary hearing.'" (*Arevalo-Iraheta, supra,* 193 Cal.App.4th at p. 1581.) We have recognized that in this way, "[s]ection 1009 preserves a defendant's substantial right to trial on a charge of which he had due notice. [Citation.] In other words, [the statute itself] protects a defendant's right to due process." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 903–904 (*Pitts*); accord, *People v. Leonard*,

supra, 228 Cal.App.4th at p. 481.) In this case, defendant is not claiming that the statute is facially unconstitutional nor has he articulated any grounds showing prejudice. Rather, the crux of defendant's grievance is that the prosecutor waited until the People rested in his second trial before moving to amend count 3 from attempted robbery to robbery. The mere timing alone, however, provides no basis for attacking the trial court's ruling, as amendment during trial is permitted by section 1009. (§ 1009; *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1531; *Arevalo-Iraheta*, *supra*, at pp. 1580–1581; *Pitts*, *supra*, at p. 903.) To the extent the proposed amendment arguably unfairly surprised defendant and caused him prejudice with respect to notice and an opportunity to defend himself, the statutory remedy was an objection and a request for a continuance.

Counsel did not object, however, and defendant's contention that this, then, constituted ineffective assistance of counsel lacks merit. (*Harrington v. Richter*, *supra*, 562 U.S. at pp. 104–105.) Counsel is presumed competent (*id.* at p. 104) and the record reveals no basis for an objection in the form of unfair surprise and prejudice based on lack of notice. The pre- and postamendment charges against defendant arose out of the same incident against victims D.R. and Rachel and involved the same facts. Defendant concedes as much; absent is any argument that his conviction for the robbery of D.R. is based on evidence not presented at the preliminary hearing.

As well, we find the authority cited by defendant for the implied proposition that he suffered prejudice inapposite.[6] In *Winters*, the defendant waived the preliminary hearing and, over his objection, the trial court permitted amendment of the information to add a new charge at the close of the prosecutor's case-in-chief. (*Winters*, *supra*, 221 Cal.App.3d at pp. 1001–1002.) The defendant did not claim prejudice, but argued that section 1009 did not authorize the amendment. (*Winters*, *supra*, at p. 1005.) The Court of Appeal held that because section 1009 does not permit amendment to add a charge

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6 As we have stated, defendant does not advance any specific claim of prejudice.

"not shown by the evidence taken at the preliminary hearing," no basis existed to permit amendment given the defendant's waiver of the preliminary hearing. (*Winters*, *supra*, at p. 1007.) This case does not involve a waiver of the preliminary hearing or a claim that the amendment was otherwise unauthorized by section 1009 and, therefore, *Winters* is distinguishable.

In *Pitts*, a multi-defendant case involving a multitude of sexual abuse charges, we reversed numerous convictions for offenses not shown at the preliminary hearing. (*Pitts*, *supra*, 223 Cal.App.3d at pp. 908, 915–916.) We did so after concluding that the variances between the preliminary hearing and the trial were material because they misled the defendants in making a defense. (*Id.* at pp. 905–906.) We observed that "[i]n such a situation, the preliminary hearing transcript would *not* afford the defendant adequate notice of the specific acts against which he might have to defend. Moreover, in such a situation the opportunity to prepare a meaningful defense would obviously be adversely affected, since the change in alleged acts would affect medical testimony, cross-examination of the alleged victim(s), etc." (*Ibid.*) In this case, there were no material variances between the preliminary hearing and trial with respect to the evidence nor does defendant contend otherwise.

Finally, in *People v. Burnett* (1999) 71 Cal.App.4th 152, 155–156 (*Burnett*), the defendant was charged, in relevant part, with being a felon in possession of a weapon, which was identified as a .38-caliber revolver. (Former § 12021, subd. (a)(1).) During trial, a witness described a second, entirely different incident involving a .357-caliber revolver and the trial court permitted the prosecutor to amend the information to strike the caliber allegation from the information. (*Burnett*, *supra*, at p. 164.) The prosecutor then argued the jury could convict the defendant based on either incident. (*Id.* at p. 169.) The Court of Appeal found the amendment striking the caliber allegation immaterial because the witness at the preliminary hearing did not testify to the gun's caliber and it found the issue of the defendant's conviction based on an incident not shown at the

preliminary hearing forfeited by virtue of counsel's failure to object. (*Id.* at pp. 178–179.) It reversed the conviction, however, because the defendant's trial attorney rendered ineffective assistance of counsel in failing to object when it became clear the jury was going to be asked to convict either on the incident that was the subject of the preliminary hearing or on the second incident described at trial, resulting in prejudice to the defendant. (*Id.* at pp. 179–183.) In this case, defendant was not convicted of an offense that was not shown by the evidence at the preliminary hearing and, thus, *Burnett* is not analogous.

In sum, defendant's limited focus on the charges as listed in the information and the prosecutor's arguments prior to amendment is misplaced. (*People v. Peyton*, *supra*, 176 Cal.App.4th at p. 657; *Pitts*, *supra*, 223 Cal.App.3d at pp. 905–906.) The focus of a claim that the trial court abused its discretion in permitting the information to be amended is properly on notice and the opportunity to present a defense, and that inquiry is viewed through the lens of the evidence presented at the preliminary hearing. (*Arevalo-Iraheta*, *supra*, 193 Cal.App.4th at pp. 1580–1581; *People v. Peyton*, *supra*, at pp. 656–658; *Pitts*, *supra*, at p. 906.) In this case, the attempted robbery count was based on the gunman demanding what D.R. had while he was standing outside the motel room; the amended robbery count was based on the theft of D.R.'s belongings from the room. The facts underlying the amended robbery count were presented at the preliminary hearing. Defendant does not contend otherwise nor does he offer any specific argument that he suffered prejudice. (*People v. Graff* (2009) 170 Cal.App.4th 345, 362; *Pitts*, *supra*, at p. 906.) In the absence of a showing that amending the information to charge robbery deprived defendant of notice and an opportunity to present a defense to the charge, the trial court did not abuse its discretion in permitting the amendment.[7]

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[7] Defendant's second claim on appeal—that he is entitled to reversal of his attempted murder conviction because the jury may have relied on the robbery of D.R. to find the attempted murder was a natural and probable consequence of robbery—is predicated on the success of his

II. Applicability of Section 654 to Sentence for Robbery of D.R.

A. Background

Assuming rejection of his due process challenge to his conviction for robbing D.R., defendant claims that because he was convicted of attempted murder based on the natural and probable consequences doctrine and harbored but a single intent, the trial court erred in punishing him for both the attempted murder of D.R. and the robbery of D.R.[8] For the reasons set forth below, we agree.

The statutory purpose underlying section 654 "is to ensure that a defendant's punishment will be commensurate with his culpability." (*People v. Correa* (2012) 54 Cal.4th 331, 341.) To that end, the statute prohibits courts from imposing multiple punishments for the same act or omission. As the California Supreme Court recently observed, however, the application of section 654 can leave courts with more questions than answers. (*Corpening*, *supra*, 2 Cal.5th at p. 312.) This is because "[n]either the text nor structure of section 654 resolves when exactly a single act begins or ends, for example, or how to take account of the fact that virtually any given physical action may, in principle, be divided into multiple subsets that each fit the colloquial definition of an 'act.'" (*Ibid.*)

As the court explained in *Corpening*, determining "[w]hether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry, because the statutory reference to an 'act or omission' may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective. [Citations.] We first consider if the different crimes were completed by a 'single physical

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due process challenge to the robbery conviction. Our rejection of due process challenge renders moot his challenge to the attempted murder conviction and we do not consider the claim.

[8] Defendant did not object to his sentence in the trial court but, as he points out, because a sentence imposed in contravention of section 654 is an unauthorized sentence, the error may be raised on appeal even in the absence of an objection. (*People v. Brents* (2012) 53 Cal.4th 599, 618.)

act.' [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single '"intent and objective"' or multiple intents and objectives." (*Corpening*, *supra*, 2 Cal.5th at p. 311.)

When there is no "explicit ruling by the trial court at sentencing, we infer that the court made the finding appropriate to the sentence it imposed, i.e., either applying section 654 or not applying it." (*People v. Mejia* (2017) 9 Cal.App.5th 1036, 1045, citing *People v. Tarris* (2009) 180 Cal.App.4th 612, 626–627.) "[The] trial court's express or implied determination that two crimes were separate, involving separate objectives, must be upheld … if supported by substantial evidence" (*People v. Brents*, *supra*, 53 Cal.4th at p. 618), that is, evidence which is reasonable, credible and of solid value (*People v. Armstrong* (2016) 1 Cal.5th 432, 450).

B. Multiple Punishments for Attempted Murder and Robbery of D.R. Unsupported by Substantial Evidence

Defendant, citing to *People v. Bradley* (2003) 111 Cal.App.4th 765 (*Bradley*), argues that "multiple punishment of an aider and abettor for robbery and attempted murder [is prohibited] when the aider and abettor's liability for the attempted murder rests solely on the natural and probable consequences doctrine …." Further, because he had only a single intent and objective in aiding and abetting the robberies, the trial court improperly imposed punishments for robbery and attempted murder.

The People, relying in part on *People v. Nguyen* (1988) 204 Cal.App.3d 181 (*Nguyen*), counter that the jury's finding the attempted murder was a natural and probable consequence of the robbery does not foreclose the trial court from finding the shooting was divisible from the robbery for the purpose of imposing multiple punishments. They contend that "[g]ratuitous violence against a helpless and unresisting victim has traditionally been viewed as not 'incidental' to robbery for purposes of … section 654"

and, here, sufficient evidence supports the trial court's determination that defendant and his coconspirators had separate intents when they robbed D.R. and then shot at him as he ran away.

In this case, although the trial court stayed the burglary sentence under section 654, it did not make any express findings regarding the applicability of section 654 to defendant's sentences for attempted murder and the robbery of D.R. Thus, in imposing but not staying the sentences for attempted murder and robbery, the court impliedly determined that the course of conduct (1) did not involve a single physical act and (2) reflected multiple intents and objectives. (*Corpening, supra,* 2 Cal.5th at p. 311.)

As an initial matter, we observe that in exercising its discretion to impose consecutive sentences for these offenses (§ 669, subd. (a); *People v. Woodworth* (2016) 245 Cal.App.4th 1473, 1479), the court reasoned, "[T]he attempted murder of victim D.R. and the robbery of D.R. were two separate … incidences and warrant consecutive sentences. Specifically, victim [D.R.] was shot in the leg, which was the force used to facilitate the robbery. Thereafter, as victim [D.R.] ran, at that time the victim had abandoned the motel room so that the suspects could steal his property. Independent of that robbery, a separate gratuitous force was used in that they attempted to kill the victim as he fled by firing two more shots. So consecutive sentences will be imposed for Counts 1 and 3."

By rule, the determination whether section 654 applies precedes the determination whether to impose a concurrent or consecutive sentence (Cal. Rules of Court, rule 4.424), and in making the latter determination, the court considers factors such as whether "[t]he crimes and their objectives were predominantly independent of each other" (*id.*, rule 4.425). Hence, while the court's aforementioned comments were made in the context of electing to impose consecutive sentences rather than concurrent sentences, its evaluation took into account factors that overlap with section 654 considerations and we

include the comments here because they supply some context for the court's implicit view that section 654 did not apply.

Turning to the propriety of the court's section 654 determination in this case, the parties disagree over the sufficiency of the evidence that defendant had multiple intents and objectives. As previously stated, defendant relies on *Bradley* as controlling. To the extent defendant is arguing, in part, that multiple punishments may never be imposed on an aider and abettor convicted based on the natural and probable consequences doctrine, we do not read *Bradley* that broadly. We agree with defendant, however, that in this case, there is no evidence he personally harbored multiple intents and objectives. (*Bradley*, *supra*, 111 Cal.App.4th at pp. 768–769.)

The defendant in *Bradley* was a participant in a scheme to lure a prosperous customer away from a casino for the purpose of robbing him and it was her role to do the luring. (*Bradley*, *supra*, 111 Cal.App.4th at p. 767.) After locating a promising, inebriated target, the defendant succeeded in luring him away from the casino and, per the group's plan, the defendant, who was driving the victim's car, pulled over. (*Ibid.*) Her two male confederates then entered the car and took control of it, during the process of which one of them leveled an Uzi at the victim and threatened him. (*Ibid.*) The defendant joined a female confederate in another car and they followed the first car to a second location, where the men robbed the victim of his valuables and then ordered him into the trunk of the car. (*Id.* at pp. 767–768.) When the victim purported not to know how to open the trunk, one of the men beat him with the Uzi and shot him eight times. (*Id.* at p. 768.)

The victim survived and the defendant was subsequently convicted of attempted murder and robbery based on aider and abettor liability. As in this case, liability for the attempted murder was premised on the natural and probable consequences doctrine. (*Bradley*, *supra*, 111 Cal.App.4th at p. 768.) The trial court imposed consecutive

sentences for the crimes and, on appeal, the defendant raised a challenge under section 654. (*Ibid.*)

The Court of Appeal held that it was error to impose consecutive sentences for the two crimes and it remanded the matter to the trial court for resentencing consistent with section 654. (*Bradley, supra,* 111 Cal.App.4th at p. 772.) The court concluded that to avoid section 654's bar on multiple punishments, the defendant must have, herself, had dual objectives and, instead, she not only had the single objective of aiding and abetting a robbery but she was in fact unaware of the attempted murder plan until she heard the gunshots signaling the completion of the crime. (*Id.* at p. 770.) The court pointed out that "[s]he was neither tried nor convicted of the attempted murder charge on the theory she intended the commission of that crime. Rather, she was convicted on a theory this second offense was a 'natural and probable' consequence of the offense she did intend, that is, the robbery." (*Id.* at p. 769.) The court noted the prosecutor could have elected to have the jury determine the defendant had the specific intent to attempt to murder the victim but did not do so. (*Id.* at p. 770.) Under such circumstances, "the trial court cannot countermand the jury and make the contrary finding [the] appellant in fact *personally* had both objectives. Indeed there is a complete absence of any evidence in this record to support such a finding had the trial judge attempted to do so."[9] (*Ibid.*)

In support of their position, the People rely on the decision in *Nguyen,* an earlier case that was discussed in *Bradley*. (*Bradley, supra,* 111 Cal.App.4th at pp. 771–772.) In *Nguyen,* a different Court of Appeal rejected a section 654 challenge to consecutive sentences for attempted murder and robbery where the attempted murder conviction also rested on the natural and probable consequences doctrine. (*Nguyen, supra,* 204

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9 In this case, the trial court expressed its view that the initial shot was the force that facilitated the robbery while the shots taken at the fleeing D.R. were intended to kill him. The prosecutor, however, argued to the jury that the conspirators intended to kill D.R. in order to effectuate the taking of his property and the shots taken at him as he fled underscored this intent to kill.

Cal.App.3d at pp. 184–185, 188.) The *Nguyen* court opined that the finding the attempted murder was a natural and probable consequence of the robbery "in no manner foreclosed the trial court's conclusion that the act of violence was sufficiently divisible from the robbery to justify multiple punishments. That a shooting may have been foreseeable, or even probable, does not mean it was necessary or useful in effectuating the robbery or that it was committed for that purpose." (*Id.* at p. 190.) The court pointed out that the shooting, which occurred *after* the victim had been relieved of his valuables and forced to lie on the ground, "constituted an example of gratuitous violence against a helpless and unresisting victim which has traditionally been viewed as not 'incidental' to robbery for purposes of … section 654." (*Ibid.*)

In reaching its contrary conclusion, the *Bradley* court observed that the *Nguyen* court did not expressly address whether the aider and abettor could be found to have entertained multiple objectives, but it recognized that the aider and abettor in *Nguyen* actively encouraged the shooting of the victim. (*Bradley*, *supra*, 111 Cal.App.4th at p. 771.) The *Bradley* court concluded that when the reasoning of its decision was applied to the facts in *Nguyen*, Nguyen's consecutive sentences were appropriate, as "[a]mple evidence in the record of that case would support a finding Nguyen shared his cohort's independent objective of attacking the victim." (*Bradley*, *supra*, at p. 772.)

Two years later, a different panel of the same Court of Appeal that decided *Bradley* revisited the *Bradley* and *Nguyen* decisions. In *People v. Cummins* (2005) 127 Cal.App.4th 667 (*Cummins*), one of the defendants challenged his consecutive sentences for attempted premeditated murder, kidnapping for the purpose of carjacking and robbery. (*Id.* at p. 681.) The *Cummins* court noted that the *Bradley* court had distinguished *Nguyen* based on the larger role Nguyen played in the crimes compared with that of Bradley. (*Cummins*, *supra*, at p. 682.) After determining the defendant's participation was commensurate with that of Nguyen, the *Cummins* court found the consecutive sentences were properly imposed. (*Id.* at pp. 682–683.)

In this case, the sole basis of defendant's liability for the attempted murder of D.R. was that it was a natural and probable consequence of robbery. As in *Bradley*, and in contrast with *Cummins* and *Nguyen*, there is an absence of evidence in the record that defendant personally possessed dual objectives. The evidence in this case was relatively simple and straightforward. Defendant and another man followed the principal up the stairs. The principal demanded everything D.R. had, cocked his handgun and shot D.R. in the leg. As D.R. turned and ran, the man fired again. The trio then entered the motel room where defendant pointed his shotgun at Rachel's head while his two companions stole D.R.'s and Rachel's property. Assuming for the sake of argument that this spare set of facts might support a finding that the principal had dual objectives, there is simply no evidentiary support for an interpretation that defendant personally shared in those dual objectives.[10]

Of further note, the acts underlying the attempted murder convictions in *Cummins*, *Bradley* and *Nguyen*, along with other decisions cited by the People in support of their argument, are distinguishable on another ground.[11] In *Cummins*, *Bradley* and *Nguyen*,

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[10] The focus of the parties' argument on appeal is intent and objective. Therefore, we assume without deciding that because the principal fired at D.R. more than once even though the first shot caused him to turn and run, the crimes were at least arguably the result of a divisible course of conduct rather than a single physical act. (*Corpening*, *supra*, 2 Cal.5th at p. 316 [where crimes were the result of a single physical act, multiple punishment is precluded and step two of analysis involving intent and objective is not reached]; *People v. Mitchell* (2016) 4 Cal.App.5th 349, 353 [intent and objective test did not apply because assault with deadly weapon and robbery constituted an indivisible transaction].)

[11] In addition to *Nguyen*, the People cited the following cases in support of their argument that there was sufficient evidence to support the imposition of multiple punishments: *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271–272 (senseless beating of feeble victim with whom the defendant had negative history supported finding of multiple objectives for the assault and robbery); *People v. Johnson* (1969) 270 Cal.App.2d 204, 208–209 (shot fired from departing vehicle was divisible from robbery where robbery had been accomplished); *People v. Birdwell* (1967) 253 Cal.App.2d 621, 631 (both acts punishable where assault was not the means of the robbery but followed the robbery); and *People v. Williams* (1966) 244 Cal.App.2d 658, 662–663 (double punishment permissible where assault occurred after objective of robbery accomplished).

the attempted murders occurred *after* the victims had been robbed of their possessions, more readily supporting the arguable existence of divisible courses of conduct involving the presence, or absence as in the *Bradley* case, of dual objectives. Here, in contrast, although multiple shots were fired, the shooting occurred as the robberies commenced and was the force that facilitated the robbery of D.R. and satisfied one of the offense's material elements.

"It has long been recognized that where a defendant is convicted of robbery and other crimes incidental to the robbery such as assault, section 654 precludes punishment for both crimes." (*People v. Mitchell*, *supra*, 4 Cal.App.5th at p. 354; accord, *People v. Hensley* (2014) 59 Cal.4th 788, 828.) In this case, the evidence shows that the attempted murder of D.R. was incidental to the robbery of D.R. and, even if we assume the evidence might arguably suggest the principal possessed an intent or objective for the shooting beyond facilitating the robbery, as discussed *ante*, there is no evidence in the record supporting a finding that defendant shared that dual objective. (*People v. Hensley*, *supra*, at p. 828 [evidence did not suggest intent or objective for shooting beyond facilitating robbery]; *People v. Pearson* (2012) 53 Cal.4th 306, 334 [robbery and sexual assault had different objectives than murder that followed them and could be punished separately].)

Accordingly, we conclude the trial court's implied determination that section 654 did not bar multiple punishments for the attempted murder and the robbery of D.R. is not supported by substantial evidence and the robbery sentence should have been stayed.

III. Senate Bill No. 1437

A. Background

Effective January 1, 2019, Senate Bill No. 1437 was enacted "to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially

results from lengthy sentences that are not commensurate with the culpability of the individual." (Stats. 2018, ch. 1015, § 1, subd. (e).) The Legislature declared it was necessary to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (*Id.*, subd. (f).)

To that end, Senate Bill No. 1437 amended section 188, defining malice, and section 189, defining the degrees of murder, to address felony murder liability. Senate Bill No. 1437 also added section 1170.95 to the Penal Code, which provides, in part:

> "A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:
>
> "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.
>
> "(2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.
>
> "(3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a).)

As explained in *People v. Martinez* (2019) 31 Cal.App.5th 719 (*Martinez*), "Pursuant to section 1170.95, subdivision (c), the petition shall include, among other things, a declaration by the petitioner stating he or she is eligible for relief based on all three aforementioned requirements of subdivision (a). A trial court that receives a petition under section 1170.95 'shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this

section.' (§ 1170.95, subd. (c).) If the petitioner has made such a showing, the trial court 'shall issue an order to show cause.' (§ 1170.95, subd. (c).)

"The trial court must then hold a hearing 'to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not … previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence.' (§ 1170.95, subd. (d)(1).) 'The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner.' (§ 1170.95, subd. (d)(2).) Significantly, if a hearing is held, '[t]he prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.' (§ 1170.95, subd. (d)(3).) '[T]he burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.' (§ 1170.95, subd. (d)(3).) 'If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges.' (§ 1170.95, subd. (d)(3).)" (*Martinez, supra*, 31 Cal.App.5th at pp. 723–724.)

B. Availability of Relief on Direct Appeal

Defendant was convicted of the attempted murder of D.R. based on the natural and probable consequences doctrine, and the parties agree that the changes in the law effected by Senate Bill No. 1437 apply retroactively to defendants whose judgments are not final on appeal. They disagree on whether a defendant is required to utilize the petition procedure under section 1170.95, however. Although the People do not concede that Senate Bill No. 1437 applies to defendants convicted of attempted murder, they argue that defendant must seek relief via the statutory petition procedure. Defendant maintains

that he is not limited to this procedure by virtue of subdivision (f) of section 1170.95, which provides, "This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner."

Several Courts of Appeal have considered whether the changes to the law effected by Senate Bill No. 1437 afford defendants relief on direct appeal and concluded that relief must be sought in the trial court in the first instance via the petition procedure set forth in section 1170.95. (*Martinez*, *supra*, 31 Cal.App.5th at p. 729; accord, *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1157–1158 (*Anthony*) [following *Martinez*]; *In re R.G.* (2019) 35 Cal.App.5th 141, 151 [interpreting Sen. Bill No. 1437 to apply to juveniles, and following *Martinez* & *Anthony*]; see *People v. Carter* (2019) 34 Cal.App.5th 831, 835 [analysis of issue not set forth in published portion of opinion, but concluding the defendants must file a petition in trial court raising Sen. Bill No. 1437 claims].) We agree with these decisions.[12]

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12 One Court of Appeal reached the merits of a Senate Bill No. 1437 claim without requiring the defendant file a petition in the trial court pursuant to section 1170.95. (*People v. Gentile* (2019) 35 Cal.App.5th 932, 944.) The court stated that the other cases considering the issue—*People v. Carter*, *Anthony* and *Martinez*—did not do so on a transfer from the California Supreme Court and resolving the issue on the merits was in the interest of judicial economy. (*People v. Gentile*, *supra*, at p. 944.) Respectfully, we disagree. In this context, we are unable to discern a meaningful distinction between considering the issue via supplemental briefing on direct appeal and considering the issue following transfer back from the California Supreme Court, nor are we persuaded that we should consider issues on grounds of judicial economy where such consideration is contrary to discernible legislative intent. We also observe that *People v. Gentile* is distinguishable based on its facts: the Court of Appeal had already analyzed the bases for the defendant's first degree murder conviction in a prior appeal and it could not determine whether the defendant was convicted as a direct perpetrator or as an aider and abettor under the natural and probably consequences doctrine. (*Id.* at pp. 941–942). The court, therefore, reversed the judgment in light of *People v. Chiu* (2014) 59 Cal.4th 155, 158–159, which held that "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine." (*Ibid.*) On remand, the People accepted a reduction to second degree murder and on appeal a second time, the defendant claimed, in relevant part, that the same error required reversal of his second degree murder conviction. (*People v. Gentile*, *supra*, at p. 941.) Reaching the merits, the Court of Appeal rejected his argument, concluding that because the defendant was, at a minimum, an active aider and abettor, he was not entitled to relief under Senate Bill No. 1437. (*People v. Gentile*, *supra*, at p. 944.)

Section 3 of the Penal Code provides that "[n]o part of it is retroactive, unless expressly so declared." However, "new laws that reduce the punishment for a crime are presumptively to be applied to defendants whose judgments are not yet final." (*People v. Conley* (2016) 63 Cal.4th 646, 656 (*Conley*), citing *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).) "The *Estrada* rule rests on the presumption that, in the absence of a savings clause providing only prospective relief or other clear intention concerning any retroactive effect, 'a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.'" (*People v. Buycks* (2018) 5 Cal.5th 857, 881–882, quoting *Conley*, *supra*, at p. 657.) "'The rule in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing substantive offenses.'" (*People v. Buycks*, *supra*, at p. 882, quoting *People v. Nasalga* (1996) 12 Cal.4th 784, 792.)

Proposition 47, passed by voter initiative in 2014, "reduce[d] many common theft- and drug-related offenses from felonies to misdemeanors for offenders who do not have prior convictions for specified violent or serious offenses" (*People v. DeHoyos* (2018) 4 Cal.5th 594, 597 (*DeHoyos*)), and Proposition 36, passed by voter initiative in 2012, amended the Three Strikes law "to reduce the punishment prescribed for certain third strike defendants" (*Conley*, *supra*, 63 Cal.4th at p. 651). Both provided petition procedures by which defendants could seek relief in the trial court based on the changes to the law effected by the propositions. (§§ 1170.18, subd. (a) [Prop. 47], 1170.126, subd. (b) [Prop. 36].) The California Supreme Court considered whether defendants whose judgments were not yet final on appeal were entitled to relief under the propositions on direct appeal or were instead required to seek relief via the petition procedure provided for by the voters. (*DeHoyos*, *supra*, at p. 597 [Prop. 47]; *Conley*, *supra*, at p. 652 [Prop. 36].) In both instances, the California Supreme Court concluded that defendants who were serving their sentences but whose judgments were not final on

appeal were required to seek resentencing through the statutory petition procedure provided for by the voters. (*DeHoyos, supra,* at p. 597; *Conley, supra,* at p. 652.)

As did Proposition 47 and Proposition 36, Senate Bill No. 1437 provides for a specific procedure by which a petitioner may seek relief from a conviction based on felony murder or murder under a natural and probable consequences theory. (§ 1170.95.) The Court of Appeal in *Martinez* extensively reviewed the *DeHoyos* and *Conley* decisions and concluded that the analytical framework set forth therein applies equally to Senate Bill No. 1437. (*Martinez, supra,* 31 Cal.App.5th at pp. 725–727; accord, *Anthony, supra,* 32 Cal.App.5th at pp. 1149–1153.)

The *Martinez* court explained, "Like Propositions 36 and 47, Senate Bill 1437 is not silent on the question of retroactivity. Rather, it provides retroactivity rules in section 1170.95. The petitioning procedure specified in that section applies to persons who have been convicted of felony murder or murder under a natural and probable consequences theory. It creates a special mechanism that allows those persons to file a petition in the sentencing court seeking vacatur of their conviction and resentencing. In doing so, section 1170.95 does not distinguish between persons whose sentences are final and those whose sentences are not. That the Legislature specifically created this mechanism, which facially applies to both final and nonfinal convictions, is a significant indication Senate Bill 1437 should not be applied retroactively to nonfinal convictions on direct appeal.

"The remainder of the procedure outlined in section 1170.95 underscores the legislative intent to require those who seek retroactive relief to proceed by way of that statutorily specified procedure. The statute requires a petitioner to submit a declaration stating he or she is eligible for relief based on the criteria in section 1170.95, subdivision (a). (§ 1170.95, subd. (b)(1)(A).) Where the prosecution does not stipulate to vacating the conviction and resentencing the petitioner, it has the opportunity to present new and additional evidence to demonstrate the petitioner is not entitled to resentencing. (§ 1170.95, subd. (d)(3).) The petitioner, too, has the opportunity to

present new or additional evidence on his or her behalf. (§ 1170.95, subd. (d)(3).) Providing the parties with the opportunity to go beyond the original record in the petition procedure, a step unavailable on direct appeal, is strong evidence the Legislature intended for persons seeking the ameliorative benefits of Senate Bill 1437 to proceed via the petitioning procedure. The provision permitting submission of additional evidence also means Senate Bill 1437 does not categorically provide a lesser punishment must apply in all cases, and it also means defendants convicted under the old law are not necessarily entitled to new trials. This, too, indicates the Legislature intended convicted persons to proceed via section 1170.95's resentencing process rather than avail themselves of Senate Bill 1437's ameliorative benefits on direct appeal." (*Martinez, supra,* 31 Cal.App.5th at pp. 727–728; accord, *Anthony, supra,* 32 Cal.App.5th at pp. 1152–1153.)

Defendant's argument that we should not follow *Martinez* in this regard relies on subdivision (f) of section 1170.95, which, as previously set forth, provides, "This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner." *Martinez,* however, confronted and rejected the same argument (*Martinez, supra,* 31 Cal.App.5th at pp. 728–729), as did the high court in *DeHoyos* and in *Conley* (*DeHoyos, supra,* 4 Cal.5th at p. 605; *Conley, supra,* 63 Cal.4th at pp. 661–662). In *DeHoyos*, the California Supreme Court explained that such language "'protects a person "from being forced to choose between filing a petition for a recall of sentence and pursuing other legal remedies to which they might be entitled (e.g., petition for habeas corpus)."' [Citation.] [The] subdivision … itself does not create an entitlement to resentencing outside of the petition process, without regard to the substantive requirements the voters prescribed …." (*DeHoyos, supra,* at p. 605.)

Accordingly, we conclude that defendant must seek relief pursuant to Senate Bill No. 1437 in the trial court in the first instance via the petition procedure set forth in section 1170.95. (*Martinez, supra,* 31 Cal.App.5th at p. 729; *Anthony, supra,* 32 Cal.App.5th at p. 1158; *In re R.G., supra,* 35 Cal.App.5th at p. 151.) As such, the issue

of whether defendant is entitled to any relief under Senate Bill No. 1437 is premature. Defendant acknowledges this but asserts we should nevertheless address the broader issue of whether Senate Bill No. 1437 applies to attempted murder because resolution of that issue is not dependent on the facts of this case.[13] We disagree. Defendant has not yet been denied relief under Senate Bill No. 1437, on this ground or any other, and we decline his invitation to engage in unnecessary statutory interpretation and constitutional analysis to resolve an issue that is not now properly before us. (*People v. Buza* (2018) 4 Cal.5th 658, 693 ["We … abide by … a '"cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more."'"]; *People v. Mosley* (2015) 60 Cal.4th 1044, 1054–1055, fn. 7 ["[T]rue adherence to judicial restraint and economy counsels against an unnecessary detour into an analysis of … statutory meaning [on an issue not before the court]."].)

IV. Senate Bill No. 620

Finally, at the time of defendant's sentencing in 2015, the trial court was required to impose the enhancements for personal use of a firearm under sections 12022.5, subdivision (a), and 12022.53, subdivision (b). (§§ 12022.5, former subd. (c), 12022.53, former subd. (h).) However, effective January 1, 2018, sections 12022.5 and 12022.53 were amended to permit a trial court, in furtherance of justice, to strike or dismiss an enhancement otherwise required to be imposed under the statutes. (Sen. Bill No. 620, ch. 682, §§ 1, 2.)

The parties agree that the amendments to sections 12022.5 and 12022.53 apply retroactively in this case and they also agree that remand for resentencing in light of Senate Bill No. 620 is required. Defendant is entitled to be sentenced in the exercise of informed discretion and, therefore, we concur with the parties that remand is appropriate

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13 The People also address the applicability of Senate Bill No. 1437 to those convicted of attempted murder, arguing that it does not apply.

so that the trial court may exercise its discretion in the first instance in light of the amendments to sections 12022.5 and 12022.53. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; *People v. Zamora* (2019) 35 Cal.App.5th 200, 206–208; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973 [analyzing analogous amendment to firearm enhancement statute pursuant to Sen. Bill No. 1393]; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424–428.) We express no opinion on how the trial court should exercise its discretion on remand.

DISPOSITION

Defendant's sentence on count 3, the robbery of D.R., is stayed pursuant to section 654. The matter is remanded to the trial court to exercise its discretion under sections 12022.5, subdivision (c), and 12022.53, subdivision (h), as amended by Senate Bill No. 620 and, if appropriate following exercise of that discretion, to resentence defendant accordingly. The trial court shall issue an amended abstract of judgment and forward it to the appropriate authorities. The judgment is otherwise affirmed.

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MEEHAN, J.

WE CONCUR:

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FRANSON, Acting P.J.

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SNAUFFER, J.